

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS
FOR THE DEPARTMENT OF VETERANS AFFAIRS

Wesley W. Winkelman,

Petitioner,

v

City of Minneapolis,

Respondent.

**FINDINGS OF FACT,
CONCLUSIONS AND
RECOMMENDATION**

The above entitled matter came on for hearing before Administrative Law Judge Steve M. Mihalchick on October 4, 2007, at the Office of Administrative Hearings, 600 North Robert Street, Saint Paul, Minnesota. The hearing was held pursuant to a Notice of Petition and Order for Hearing dated August 14, 2007.

The Petitioner, Wesley W. Winkelman, 1449 10th Street NW #204, New Brighton, MN 55112, appeared on his own behalf. Michael J. O'Donnell, Business Agent for Teamsters Local 320, 3001 University Ave SE, Suite 500, Minneapolis, MN 55414, assisted the Petitioner in the proceeding. Trina R. Chernos, Assistant Minneapolis City Attorney, 333 South 7th Street, Suite 300, Minneapolis, MN 55402-2453, appeared on behalf of the City of Minneapolis ("the City"). The hearing record closed on November 8, 2007, upon resolution of a dispute over the contents of Petitioner's post hearing brief.

STATEMENT OF THE ISSUES

1. The issue to be determined in this proceeding is whether the City abolished Petitioner's Truck Driver position in good faith within the meaning of Minn. Stat. §197.46?

The Administrative Law Judge concludes that the Petitioner's position was abolished in good faith.

2. If so, is Petitioner entitled to relief under Minn. Stat. § 197.481?

The Administrative Law Judge concludes that he is not entitled to relief.

Based on the evidence in the hearing record, the Administrative Law Judge makes the following:

FINDINGS OF FACT

1. The Petitioner, Wesley W. Winkelman, served in the U.S. Army on active duty from August 11, 1971 to August 1, 1973. He received an honorable discharge.¹

2. On July 24, 2000, Petitioner began working for the City in the position of Laborer. On January 11, 2004, Petitioner was promoted to the position of Truck Driver.² Truck Drivers must hold a commercial driver's license and the appropriate endorsement to drive particular vehicles.³

3. Truck Drivers' duties vary based on the division worked for and the season of the year. While most of the work is driving, other duties, such as traffic control or other Laborer duties may be assigned.⁴

4. Petitioner works in the Fleet Services Division (Fleet Services) of the City's Public Works Department (PWD). PWD consists of approximately 1,300 employees in a number of divisions. Fleet Services acts as a "motor pool", providing operators for heavy equipment and drivers for trucks, to the various PWD projects going on around Minneapolis. Fleet Services does not have a dedicated budget. Funding for Fleet Services is through an internal service fund, whereby services are charged to the various projects that require the equipment and staff that Fleet Services provides.⁵ PWD assigns drivers and, when they are available, operators, to drive trucks for Fleet Services.⁶

5. Steven Kotke, Director of PWD, City Engineer, received information suggesting that need for Fleet Services would be reduced in 2007 and 2008. Kotke asked Paul Ogren, Director of Field Services for PWD, to assess the projected need for Drivers and Operators ("D&O") through the summer construction seasons for 2007 and 2008.⁷ Ogren broke out the assessment into: 1) scheduling, based on known projects, 2) preparing an assignment document to aid in scheduling for 2007 and 2008, 3) placing data analysis into graphical formats to assist in decision-making, 4) recommending action based on summer operational needs, and 5) assessing possible winter operational impacts.⁸

6. Ogren met with staff in the City's Engineering Department and Field Services to determine the schedule of projects in 2007 and tentative projects in 2008.

¹ Exhibit 14.

² Exhibit 5, at 2; Testimony of Petitioner.

³ Testimony of Paul Ogren.

⁴ Testimony of Petitioner.

⁵ Testimony of Steven Kotke.

⁶ Testimony of Ogren. While operators can drive trucks, drivers cannot operate heavy equipment, due to limitations in training and certification. *Id.*

⁷ Ogren is now Strategic Operations Coordinator for PWD, a reduction in position due to the same staff reorganization affecting Petitioner. Testimony of Ogren.

⁸ Exhibit 3, at 1.

7. In April 2007, Ogren presented the results of his analysis to Kotke and Heidi Hamilton, Deputy Director of PWD. Of the then-current total of 59 Operators and 68 Drivers, Ogren took into account the anticipated vacation and budgetary leave of current D&Os to determine the number of workers actually available for work. He also used the “10% Rule” which is, based on the experience of the City’s Public Works managers, that “10% of the Equipment work force is not available for all combined reasons (benefits, no-shows, health reasons, disciplinary, etc.).”⁹

8. Ogren’s projections determined that there were consistently more D&Os available than were needed due to the work available.¹⁰ The average availability was determined to be 118 D&Os, while the average need was for 93 D&Os.¹¹ In the assessment of impact on winter operations, Ogren spoke to Mike Kennedy, Director of Winter Operations, who concluded that a reduction of five Drivers and 5 Operators would not result in a reduction of service to the public in a snow emergency.¹²

9. The seasonal nature of work and timing of various projects renders the staffing needs of Fleet Services both variable and difficult to forecast. To the extent possible, Kotke rescheduled projects to smooth the demand for D&Os and ensure that the maximum number of existing employees could be retained. Based on the study performed, Kotke made the decision as to how many D&O positions would be reduced. Kotke considered using unpaid leave as a means of addressing the imbalance, but he concluded that the resulting uncertainty of work experienced by employees was unacceptable.¹³

10. Kotke determined that nine operator and six driver positions would be eliminated. In the discussions of workforce reductions, no particular employees were mentioned and no performance issues were raised.¹⁴ No employee’s veteran status was raised in the process. The least senior employees in each classification were chosen to receive layoff notices.¹⁵

11. The City issued layoff notices on June 25, 2007, to 13 employees, including Petitioner.¹⁶ The layoff notices included notice of the rights of veterans to appeal the removal if it was not done in good faith.¹⁷

12. In accordance with the collective bargaining agreements governing the affected employees, those laid off were placed in the City Job Bank. From the Job Bank, the laid off employee could seek a different position with the City, including exercising bumping rights. Petitioner was directly told that he had bumping rights into

⁹ *Id.* at 4.

¹⁰ Exhibit 1; Testimony of Ogren.

¹¹ Exhibit 3, at 13-18.

¹² Exhibit 3, at 6; Testimony of Ogren.

¹³ Testimony of Kotke.

¹⁴ Testimony of Kotke; Testimony of Ogren.

¹⁵ Testimony of Brenda Shepard.

¹⁶ For the remaining two positions, one employee took a different position and the other employee retired. Testimony of Ogren.

¹⁷ Exhibit 5.

the Seasonal Construction and Maintenance Laborer positions and the effect of that bumping was explained.¹⁸ The period in the Job Bank runs for 60 days at which time the layoff takes place. Petitioner's layoff date was effective August 24, 2007.¹⁹

13. On July 3, 2007, Ogren provided a memo to Hamilton describing the overall approach to workforce reduction as it affected the D&O positions. The memorandum was prompted by an inquiry from two City Council members regarding the layoffs. Along with the estimates of need, similar to those described above, the memorandum stated:

- Due to normal attrition early in the summer construction season, the total number of Drivers and Operators is now at 66 and 59 respectively for a total of 125.
- Our workforce reduction plan eliminated 6 Driver positions and 9 Operator positions, thus reduces the compliment of Drivers and Operators to 62 and 50 respectively for a total of 112.
- Since 2 of the Drivers are no longer with the City, layoff notices were given to 13 employees; 4 Drivers and all 9 Operators.
- Historically on any given day, 10% of the Drivers and Operators are off, on average, due to vacation, compensation time, sick leave, FMLA, Worker's Compensation issues, etc. This brings the compliment to approximately 100 Drivers and Operators that are available to work daily compared with an average need of 95.
- Our past tracking and current projection graphs have indicated that our peak needs (needs greater than availability) would occur during the week of June 25th and the first week in July (which have panned out). We are projecting other peak needs around July 11th to the 27th and again around August 22. During this time, we anticipate the need to supplement our fleet with outsourced resources such as permit Drivers/Operators and/or contracting with the private sector. This need is typically for trucking services (commonly referred to as ITOs or Independent Trucking Organizations). This practice has been a standard procedure to meet peak needs for many years.
- There may also be times that non-City Drivers may be working. For example: special soil handling, etc. Public Works strives to ensure that City Drivers and trucks are utilized first where possible and practical.
- The Paving Construction section did experience an unanticipated peak (average of 9 per day) during the week of June 18th, due to projects delays. Consequently, it was necessary to increase production in one area

¹⁸ Testimony of Shepard.

¹⁹ Exhibit 4, at 19; Testimony of Ogren; Testimony of Shepard.

to keep the crews in other areas moving forward/maintain a steady work flow.

- The City utilized permit/contract equipment a total of 8 days between the dates of May 1st and June 18th. On average, 3 — 4 pieces of equipment were employed each of the 8 days.
- Looking ahead to the Fall Sweeping Operations, it is not anticipated that we will have a peak period (i.e. need greater than availability) during that time. Currently it is projected that much of our construction work will be done, so that there should be enough internal resources to perform the Fall Sweep. As stated above, weather, project availability, and changing conditions have an affect on the accuracy of long-range projections.
- At no time since May 1st have we had permit employees or contract equipment working without all Public Works Drivers and Operators working.²⁰

14. Petitioner does not believe that the City was motivated to remove him based on his status as a veteran. Petitioner does not dispute that the City followed seniority in selecting the employees to be laid off.²¹

15. Petitioner observed that the number of trucks operated by private contractors on City jobs increased in the summer of 2007. On at least one occasion, the Petitioner observed that the number of trucks involved with a particular project created a significant degree of confusion.²²

16. On August 3, 2007, Petitioner filed a petition with the Department of Veterans Affairs alleging that his position was not eliminated in good faith and requesting reinstatement to his prior position as a Truck Driver.²³ On August 14, 2007, the Commissioner of Veterans Affairs issued a Notice of Petition and Order for Hearing, setting this matter on for hearing before an Administrative Law Judge.

17. The City's current complement of D&Os is adequate for normal winter operations. During a snow event, the existing staffing, supplemented by overtime work, is adequate. In a snow emergency, the City expects to utilize other staff in PWD (such as mechanics who hold commercial driver's licenses and have received appropriate training) to meet the need for snow removal, salting, and sanding.²⁴ Current employees' normal activities are suspended during snow emergencies to address staffing needs. No hiring of full-time employees is planned by PWD unless the circumstances strongly

²⁰ Exhibit 2.

²¹ Testimony of Petitioner.

²² Testimony of Petitioner.

²³ Exhibit 14, Petition at 1-2.

²⁴ Testimony of Ogren.

indicate that the work available justifies the hiring.²⁵ Petitioner has recall rights to the position he was laid off from for a period of three years.²⁶

18. When Petitioner's position was abolished, none of the tasks he had performed were assigned to any other less senior City employee.²⁷

19. The City determined, in good faith, that the complement of D&O positions in PWD was larger than the work available and the work reasonably projected in the near future. The decision to reduce positions in the D&O classifications was made in good faith. Instituting layoffs by seniority was consistent with the collective bargaining agreement governing Petitioner's employment.

Based upon the foregoing Findings of Fact, the Administrative Law Judge makes the following:

CONCLUSIONS

1. The Administrative Law Judge and the Commissioner of Veterans Affairs have jurisdiction in this matter pursuant to Minn. Stat. §§ 14.50 and 197.481.

2. The parties received proper notice of the issues in this proceeding and this matter is, therefore, properly before the Administrative Law Judge.

3. The Department of Veterans Affairs has complied with all relevant substantive and procedural requirements of law.

4. Petitioner is an honorably discharged veteran within the meaning of Minn. Stat. §§197.46 and 197.447 of the Veterans Preference Act.

5. Minn. Stat. §197.46 prohibits the removal of a veteran from public employment except for incompetency or misconduct shown after a hearing, upon due notice and upon stated charges in writing.

6. Public employers may abolish positions held by veterans notwithstanding the Veterans Preference Act if the abolition of the position is in good faith.²⁸

7. The burden of proof is upon Petitioner to prove by a preponderance of the evidence that he was removed from public employment without a hearing. Once a removal is established, the burden of proof is upon the Employer to prove by a preponderance of the evidence that the veteran's position was abolished in good faith.²⁹

²⁵ Testimony of Kotke.

²⁶ Testimony of Shepard.

²⁷ There was a tie in seniority in the layoff process, which was resolved by random selection, in accordance with the collective bargaining agreements terms. Testimony of Shepard.

²⁸ **Young v. City of Duluth**, 386 N.W.2d 732, 738 (Minn. 1986).

²⁹ Minn. R. 1400.7300, subp. 5 (2003); **Holmes v. Board of Commissioners of Wabasha County**, 402 N.W.2d 642 (Minn. App. 1987).

8. Petitioner was removed from his Truck Driver position with the City within the meaning of Minn. Stat. §197.46.

9. Petitioner's removal was not for reasons of incompetency or misconduct as those terms are defined by Minn. Stat. §197.46.

10. Petitioner's removal from his Truck Driver position was the result of the City's good faith decision to abolish his position.

11. Petitioner's veterans preference rights under Minn. Stat. § 197.46 were not violated by the Respondent because Petitioner's removal was the result of the City's good faith decision to conform staffing in the City's PWD with the reasonably anticipated workload.

12. The City has provided Petitioner with the procedural and substantive rights to which he is entitled.

Based upon the foregoing Conclusions, the Administrative Law Judge makes the following:

RECOMMENDATION

IT IS RESPECTFULLY RECOMMENDED that the Commissioner of Veterans Affairs order that the Petition of Wesley W. Winkelman be DENIED.

Dated this 27th day of November, 2007.

/s/ Steve M. Mihalchick
STEVE M. MIHALCHICK
Administrative Law Judge

Reported: Digitally Recorded
No Transcript Prepared

NOTICE

This report is a recommendation, not a final decision. The Commissioner of Veterans Affairs will make the final decision after a review of the record. The Commissioner may adopt, reject or modify these Findings of Fact, Conclusions, and Recommendations. The parties have 10 calendar days after receiving this report to file Exceptions to the report. At the end of the exceptions period, the record will close. The Commissioner then has 10 working days to issue his final decision. Parties should contact Clark Dyrud, Commissioner of Veterans Affairs, Veterans Service Building, 20 West 12th St., Second Floor, St. Paul, MN 55155-2006, (651) 296-2562, to learn the

procedure for filing exceptions or presenting argument.

Under Minn. Stat. § 14.62, subd. 1, the agency is required to serve its final decision upon each party and the Administrative Law Judge by first class mail or as otherwise provided by law.

MEMORANDUM

This proceeding arises out of the Veterans' Preference Act (VPA or Act), Minn. Stat. § 197.46. Petitioner alleges that the City violated the Act, as a matter of law and fact, when Petitioner was laid off from his position, resulting in his terminating his employment with the City. Petitioner maintains that the layoff constitutes a removal in bad faith, thereby entitled him to reinstatement and compensatory damages.

Minn. Stat. § 197.46 governs a veteran's removal from employment with a city or other public employer. With respect to removals, it states, in part, as follows:

No person holding a position by appointment or employment in the several . . . cities . . . in the state, who is a veteran separated from the military service under honorable conditions, shall be removed from such position or employment except for incompetency or misconduct shown after a hearing, upon due notice, upon stated charges, in writing.

The court rulings have held consistently that the statute does not apply to the good faith abolition of a position held by a veteran. The Minnesota Supreme Court discussed this exception to the statute as follows:

The purpose of this section [the Veterans' Preference Act] is to take away from the appointing officials the arbitrary power, ordinarily possessed, to remove such appointees at pleasure; and to restrict their power of removal to the making of removals for cause. But it is well settled that statutes forbidding municipal officials from removing appointees except for cause are not intended to take away the power given such officials over the administrative and business affairs of the municipality, and do not prevent them from terminating the employment of an appointee by abolishing the office or position which he held, if the action abolishing it be taken in good faith for some legitimate purpose, and is not a mere subterfuge to oust him from his position. The municipal authorities may abolish the position held by an honorably discharged soldier and thereby terminate his employment, notwithstanding the so-called veterans' preference act.³⁰

In a later decision, the Minnesota Supreme Court elaborated on the good faith exception to the Act stating:

³⁰ *State ex rel. Boyd v. Matson*, 155 Minn. 137, 141-142, 193 N.W. 30, 32 (1923).

If the City merely assigned Young's duties to nonveteran employees less senior than he, his position was not abolished in good faith, and he is entitled to reinstatement with back pay. The Veterans' Preference Act is applicable to cases in which public employers reassign duties in times of revenue shortfalls and budget cuts. No exception in the Act exists for such situations. Thus, veterans have a preference over nonveteran employees less senior than they to continue to perform duties for which they are qualified if the public employer continues to need such duties performed. * * *³¹

Petitioner argues that his removal was in bad faith. He maintains that the truck driving function of the Fleet Services Division of City's PWD continues to be performed, now by private contractors. In *Young*, the Minnesota Supreme Court said:

[W]e have consistently held that a veteran is entitled to a writ of mandamus ordering the public employer to reinstate the veteran to his or her former position with back pay when it is established, after a hearing, that the public employer, under the pretext of abolishing a veteran's position, actually continued it under some other name or reassigned the veteran's duties to some other employee.³²

In *Young*, the veteran's duties were assigned to employees less senior than Young. Young was terminated to further a policy decision to replace employees being paid the highest salaries with employees being paid less. Rather than abolishing the position, the employer removed the veteran (Young) from the position.

In this case, the City has not assigned Petitioner's duties to a less senior employee. The City has assessed the work to be performed, on a year-round basis, and determined that the level of work supports a smaller complement of D&Os. On the limited occasions when the workload exceeds the capacity of the reduced complement, the City utilizes private contractors. No employees of the City are assigned to perform the duties that the Petitioner had performed.

Petitioner maintains that bad faith can be inferred from the volume of work that was experienced over the summer of 2007. The City based its decision to conduct layoffs on a forecast of work to be performed in both 2007 and 2008. The City demonstrated that there was a sufficient lack of work to be performed by D&Os to support a reduction in the workforce. There is no evidence that the City was motivated by any other reason than efficiency in conducting the layoffs. There is no evidence that the City attempted to oust the Petitioner from his position for improper reasons or to circumvent the hearing requirements of the Veterans Preference Act.

³¹ *Young v. City of Duluth*, 386 N.W.2d 732, 738-39 (Minn. 1986).

³² *Young*, 386 N.W.2d 732, 738.

In most cases involving the bad faith abolishment of a veteran's position, "it generally has appeared that there was prompt re-creation of the office or position under a different name or assignment of the work thereof to another department, followed by appointment of a new appointee to perform the work formerly done by the incumbent of the office or position claimed to have been abolished."³³ Petitioner's position has not been re-created under a different name. The duties being performed by private contracts are on an "as needed" basis. This is substantially different from the year-round nature of Petitioner's position with the City. The contract work with the City does not constitute reassignment within the meaning of *Young* or *Thomas*.

The City maintains that its action is not a removal for purposes of the Veterans Preference Act since the entire Truck Driver classification was not eliminated and Petitioner may be recalled by the City over the next three years. The City maintains that a "removal" only occurs where the employer's action makes it unlikely or improbable that the veteran will return to the job.³⁴ The City's argument is not well taken. In *Anderson*, the veteran was on a voluntary disability leave, during which the veteran was paid disability benefits and held the status of a retired employee.³⁵ Petitioner is not volunteering to be laid off from his job with the City and he will not be paid during the three years that he might be recalled from layoff. While Petitioner had bumping rights into a lower position, that does not render the City's action anything other than removal. Petitioner was removed from his position with the City on August 24, 2007, and the Veterans Preference Act applies to the removal.

The City notes that the elimination of an entire city police department and contracting with the county for law enforcement services was upheld as a good faith abolition of position.³⁶ In *Taylor*, the cost savings to the municipality in abolishing its police department were undisputed.³⁷ In this matter, Petitioner disputes the cost savings to be derived from using occasional private contractors and maintains that the lack of such savings demonstrates bad faith.³⁸

There is no evidence that the City will be experiencing higher costs due to the layoffs through private contracting. The methodology used by the City in assessing its need for D&Os is reasonable on its face. There is no evidence that the process was manipulated to target Petitioner's position. The City's action was taken in good faith and not to oust a veteran without providing the protections of the Act.

The City's motives in laying off employees, including the Petitioner, from the PWD was to match the size of the workforce with the work available. There is no evidence that the City was acting in bad faith or abolished these positions merely to oust Petitioner from his position. The Petitioner's position of Truck Driver was abolished

³³ *State ex rel. Niemi v. Thomas*, 223 Minn. 435, 438-39, 27 N.W.2d 155, 158 (1947).

³⁴ City Brief, at 5 (citing *Anderson v. City of Minneapolis*, 503 N.W.2d 780 (Minn. 1993)).

³⁵ *Anderson*, 503 N.W.2d at 781 (the City used a fictional "voluntary demotion" to allow the veteran to maintain his seniority as the original hire date, not his return from disability).

³⁶ City Brief, at 11 (citing *Taylor v. City of New London*, 536 N.W.2d 901 (Minn. App. 1995)).

³⁷ *Taylor*, 536 N.W.2d at 903.

³⁸ Petitioner's Brief, at 1.

in good faith within the meaning of the Veteran's Preference Act. Therefore, Petitioner's request that the Commissioner reinstate him to his former position should be denied.

S.M.M.